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1. [*Kolashuk v. Hatch, 2017 Conn. Super. LEXIS 6614*](#)

Client/Matter: -None-

Kolashuk v. Hatch

Superior Court of Connecticut, Judicial District of New London At New London

September 1, 2017, Decided

NO. CV 17-6028727

Reporter

2017 Conn. Super. LEXIS 6614 *

JOSEPH KOLASHUK, PPA, DANIELLE KOLASHUK, v.
KYLE HATCH

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE

Core Terms

defense counsel, cell phone records, records, sanctions, discovery, party's, trial court, quotation, Heating, marks, noncompliance, impose sanctions, cell phone, assurance

Judges: [*1] Bates, J.

Opinion by: Bates

Opinion

MEMORANDUM OF DECISION

RE: MOTIONS FOR SANCTIONS

INTRODUCTION

The plaintiff, Joseph Kolashuk, moves for sanctions (#126 and #138) against the defendant's counsel, Lawrence Adler, on the basis that he failed to turn over or even seek to turn over the defendant's cell phone records from the cell phone that the defendant used on the date of the subject collision.

This court ordered the defendant on May 9, 2017 (see order #109.01) to make those cell phone records available.

Defense counsel did not comply with the order of the court until July 28, 2017, when arrangements were made with attorneys for the owners of the company, R&W Heating, independently to turn over the requested cell phone logs. As a result of the delay over the requested documents, the plaintiff's attorney is seeking attorney's fees and costs in obtaining these documents and a sanction of \$5,000 against Attorney Adler for his alleged failure to comply with the court order.

In response to the plaintiff's motions, defense counsel argues that the defendant has fully complied with the court's order to the best of his abilities because Adler's client, Kyle Hatch, did not own the cell phone records requested by the plaintiff [*2] and ordered produced by the court, and, therefore, had no obligation to comply.

The court notes that in a deposition of Mr. Hatch on March 17, 2017, Attorney Adler, when asked if he could produce the cell phone records assured Attorney Reardon, "I'm sure we can work something out. I don't have any objection to you getting any records, so we will try to work something out." Adler, on that date, also said to Reardon, "You and I could probably, early next week, work out a parameter of production. I can probably get you what you need." It is undisputed that Adler failed to follow through on Ms commitment until outside counsel provided the necessary documentation several months later.

ANALYSIS

"A party's opinion concerning the necessity for a particular order does not excuse his disobedience.... There is no privilege to disobey a court's order because the [party] believes that it is invalid ... [or] should not be obeyed." (Internal quotation marks omitted.) [Hibbard v. Hibbard](#), 139 Conn. App. 10, 19, 55 A.3d 301 (2012). "An order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper

proceedings." (Citation omitted; internal quotation marks omitted.) [Cologne v. Westfarms Associates, 197 Conn. 141, 147, 496 A.2d 476 \(1985\)](#).

Our Supreme [*3] Court has "long recognized that, apart from a specific rule of practice authorizing a sanction, the trial court has the inherent power to provide for the imposition of reasonable sanctions, to compel the observance of its rules." (Internal quotation marks omitted.) [Millbrook Owners Assn., Inc. v. Hamilton Standard, 257 Conn. 1, 9, 776 A.2d 1115 \(2001\)](#). "Our trial courts have the inherent authority to impose sanctions against an attorney and his client for a course of claimed dilatory, bad faith and harassing litigation conduct, even in the absence of a specific rule or order of the court that is claimed to have been violated." (Internal quotation marks omitted.) [Id., 9-10](#).

The rules of practice also provide specific instances in which the trial courts may impose sanctions. [Practice Book § 13-14 \(a\)](#) provides in relevant part: "If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production ... or has failed to comply with the provisions of Section 13-15,... or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order as the ends of justice require." [*4]

"Under [§ 13-14](#), the trial court has broad discretion to fashion and impose sanctions for failure to comply with the rules of discovery to meet the individual circumstances of each case." (Internal quotation marks omitted.) [Ugalde v. Saint Mary's Hospital, Inc.](#), Superior Court, judicial district of Waterbury, Docket No. CV-15-6028359-S (June 8, 2016, [Shapiro, J.](#)), quoting [Duart v. Dept. of Correction, 303 Conn. 479, 490, 34 A.3d 343 \(2012\)](#). "[A] court may, either under its inherent power to impose sanctions in order to compel observance of its rules and orders, or under the provisions of [§ 13-14](#), impose sanctions, including the sanction of dismissal.... The decision to enter sanctions ... and, if so, what sanction or sanctions to impose, is a matter within the sound discretion of the trial court." (Citations omitted; internal quotation marks omitted.) [Ugalde v. Saint Mary's Hospital, Inc.](#), *supra*, Superior Court, Docket No. CV-15-6028359-S.

The rules of practice are designed and intended to "both facilitate business and advance justice" [Millbrook Owners Assn., Inc. v. Hamilton Standard, supra, 257](#)

[Conn. 16](#). Furthermore, the "rules of discovery are designed to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (Internal quotation marks [*5] omitted.) [Wexler v. DeMaio, 280 Conn. 168, 188-89, 905 A.2d 1196 \(2006\)](#).

"Traditionally, [our Supreme Court has] reviewed the action of the trial court in imposing sanctions for failure to comply with its orders regarding discovery under a broad abuse of discretion standard. [Our Supreme Court has] stated: The factors to be considered by the court include: (1) whether noncompliance was caused by inability, rather than wilfulness, bad faith or other fault; (2) whether and to what extent noncompliance caused prejudice to the other party, including the importance of the information sought to that party's case; and (3) which sanction would, under the circumstances of the case, be an appropriate judicial response to the noncomplying party's conduct." [Millbrook Owners Assn., Inc. v. Hamilton Standard, supra, 257 Conn. 15](#).

In [Millbrook Owners Assn., Inc. v. Hamilton Standard, supra, 257 Conn. 15](#), the court clarified the standard of review applied to a trial court's order of sanctions for a violation of a discovery order. Specifically, the court stated that, "[i]n order for a trial court's order to withstand scrutiny, three requirements must be met."

"First, the order to be complied with must be reasonably clear. In this connection, however, we also state that even an order that does not meet this standard may form the basis of a sanction if the record establishes that, notwithstanding the [*6] lack of such clarity, the party sanctioned in fact understood the trial court's intended meaning. This requirement poses a legal question that we will review de novo. *Id.*

"Second, the record must establish that the order was in fact violated. This requirement poses a question of fact that we will review using a clearly erroneous standard of review. [Id., 15-16](#).

"Third, the sanction imposed must be proportional to the violation. This requirement poses a question of the discretion of the trial court that we will review for abuse of that discretion." [Id., 16](#).

The plaintiff submits that the defense attorney needlessly and intentionally prolonged the discovery process by refusing to provide the requested cell phone records. However, defense counsel argues that it would have been illegal and unethical for him to provide the

plaintiff's with records that the defendant did not own. Specifically, the defendant relies solely on [General Statute § 16-247u \(b\)](#), which provides in relevant part: "No person shall: (1) knowingly procure, attempt to procure, solicit or conspire with another to procure a telephone record of any resident of this state without the authorization of the customer to whom the record pertains ... or (3) receive a telephone [*7] record of any resident of this state with the knowledge such record has been obtained without the authorization of the customer to whom the record pertains ..."

However, § 15-247u (c) provides in relevant part: "The provisions of this section shall not apply to any person acting pursuant to a valid court order" This court's order (#109.01) made clear that the cell phone records were to be produced for the time requested by the plaintiff (motion #109), which was from 10:00 a.m. to 11:00 a.m. on March 5, 2016, the date and time of the accident. Despite defense counsel's assurance in the deposition, that he would arrange to have the cell phone records produced, he reneged on this assurance stating the cell phone records were owned by R&W heating - - a company owned by the defendant's parents, not by the defendant himself. Therefore, according to defense counsel, the defendant could not deliver on his promise to work things out and produce the records. However, defense counsel offered no evidence that he asked his client or the owners of R&W Heating to allow counsel to fulfill his assurance and provide access to cell phone records.

Instead, defense counsel tried to use the production [*8] of the cell phone records as a lever to limit discovery, for example, seeking a quid pro quo that there would be no further request to examine the cell phone.

On June 14, 2017, the court further articulated its order by explaining that the court ordered the cell phone records be provided on May 9, 2017, irrespective of ownership of those records. Specifically, the court stated, "I wasn't meaning to limit it to ownership. I was meaning it to apply to the cellphone he used." (June 14, 2017, Hearing Transcript, 34-35). That the records were owned by R & W Heating does not obviate the defense counsel's obligation to inquire with R&W Heating regarding permission to access the cell phone records for the defendant's phone number for the specified limited time frame on March 5, 2016. To date, defense counsel has not produced the cell phone records from the phone used on the day of the alleged incident, thereby evidencing an ongoing violation of this court's

order. Those records were, instead, delivered to plaintiff's counsel by outside counsel.¹

In the discovery context, as discussed above, the factors in imposing sanctions to be considered include: "(1) whether noncompliance was caused by inability, [*9] rather than wilfulness, bad faith or other fault; (2) whether and to what extent noncompliance caused prejudice to the other party, including the importance of the information sought to that party's case; and (3) which sanction would, under the circumstances of the case, be an appropriate judicial response to the noncomplying party's conduct." [Millbrook Owners Assn., Inc. v. Hamilton Standard, supra, 257 Conn. 15.](#)

Here, the defense counsel's failure to respond to the plaintiff's discovery request and the violation of the court's order (#109.01) were not caused by inability to comply. Rather, the correspondence between the plaintiff and the defense counsel demonstrate the contrary. In the letter dated May 18, 2017, defense counsel asks the plaintiff to confirm that, "if [defense counsel] can obtain the records that you seem to be seeking and provide them to you, you withdraw any further requests for possession of my client's or his parent's business cell phone ... requests for phone records beyond the time limit specified by Judge Bates." (See #126.00, Exhibit G). In the same letter, defense counsel further states that, "[o]nce I receive this confirmation, I will make the arrangements for what I understand you are looking for with the appropriate parties." [*10] This letter demonstrates that, at the very least, defense counsel could have inquired with R & W regarding its willingness to provide the records or sign a release, allowing defense counsel to obtain the records in compliance with this court's order.

There is no evidence that he did so.

Furthermore, the information that was sought by the plaintiff's is central to the plaintiff's claims. Specifically, the plaintiff has alleged that the defendant was using a cell phone at the time of the collision on March 5, 2016. The defense counsel's failure to comply with the court's order prejudiced the plaintiff's ability to fully investigate its claims against the defendant.

¹ In its brief filed on August 1, 2017, the plaintiff represents to the court that the plaintiff is in possession of the requested cell phone records, which were provided by two non-appearing attorneys.

The defense counsel's argument that the records are not owned by the defendant, and, thus, the defendant, by providing nothing, has fully complied with the order because he cannot provide records which he does not own, is unavailing. The record reflects that defense counsel, at the very least, should have inquired with the defendant's parents, the owners of R & W Heating, regarding turning over the limited phone records sought by the plaintiff.

CONCLUSION

The court, having considered the evidence, written submissions, and arguments [*11] presented by the parties, and the parties having had opportunity to be fully heard grants the plaintiff's motion for sanctions against the defense counsel. Having found that the defense counsel is in violation of [Practice Book Section 13-14 \(a\)](#), counsel will pay the plaintiff \$2,500 in sanctions within thirty days of this order. Plaintiffs counsel is also invited to present the court with an accounting of time spent by plaintiff's counsel seeking the cell phone records and a request for payments of legal fees based on counsel's customary hourly rate plus costs.²

/s/ Bates

Bates, J.

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² The court has reviewed the cases provided by the defendant seemingly arguing that defense counsel cannot be held liable for sanctions for failing to deliver something his client did not own. In this case, however, defense counsel assured plaintiff's counsel of release of the phone records, but then set a series of conditions for their release and ultimately proclaimed his client did not control the records and did not provide them. Only when he was threatened with sanctions for not securing the promised records did he arrange for representatives of R&W Heating to deliver the necessary authorization for receipt of said records. The process of civil discovery is not supposed to be a cat and mouse game, and under the circumstances in this case, the refusal of defense counsel to seek and or obtain those records for several months merits sanctions.